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No. 83-

In The
Supreme Court of the United States
October Term, 1983

MULTIFLEX, INC.,

Cross-Petitioner,

vs.

SAMUEL MOORE AND COMPANY and EATON CORPORATION,

Cross-Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Is "fact of damage" under Section 1 of the Sherman Act satisfied by undisputed evidence of virtually complete exclusion of a new entrant (Cross-Petitioner) from all sales over more than a two year period to all middlemen (OEMs) in the relevant market, where such exclusion results from a conspiracy between those middlemen and the dominant manufacturer?

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Cross-Petitioner, Multiflex, Inc., prays that a writ of certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 22, 1983, with respect to the portion of that Opinion and Judgment dealing with the "fact of damage" under Section 1 of the Sherman Act.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 709 F.2d 980. It is reproduced in Appendix A of the Petition for Writ of Certiorari filed by Petitioners Samual Moore and Company and Eaton Corporation. Also, the petition for rehearing dated September 14, 1983 is reproduced in Appendix B to the Petition for Writ of Certiorari. The district court's judgment, dated September 4, 1981, which includes the jury interrogatories, is reproduced in Appendix C of that Petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1). This Cross-Petition for Writ of Certiorari is filed under U.S. Supreme Court Rule 19.5. The Petition for Certiorari in connection with which this Cross-Petition is filed was received on December 15, 1983.

STATUTORY PROVISIONS

The statutory provisions involved in this Petition are Section 1 of the Sherman Act, 15 U.S.C. §1, which provides as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or com-

merce among the several states, or with foreign nations, is declared to be illegal: . . ."[1]

And Section 4 of the Clayton Act, 15 U.S.C. §15, which provides as follows:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."[2]

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STATEMENT OF THE CASE

Cross-Petitioner, Multiflex, Inc.[3] adopts and incorporates by reference the Counterstatement of the Case in Respondent's Opposition to the Petition for Writ of Certiorari. The following additional comments are specifically directed to this Cross-Petition.

The jury found that there was a conspiracy between Moore and the three middlemen (OEMs), App. C at p. 2c. The court below analyzed the evidence and agreed that

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[1] The remainder of that statute is not pertinent to this Cross-Petition.

[2] The remainder of that statute is not pertinent to this Cross-Petition.

[3] Under Rule 28.1, Multiflex U.K., Inc. and Multiflex Offshore Services, Ltd., are subsidiaries, and M.F.X. do Brazil Ltda. is an affiliate.

there was "ample evidence of a conspiracy to restrain trade". 709 F.2d at 988; App. A at p. 10a.

The court below found that the evidence Multiflex presented showed the existence of the conspiracy beginning with the January, 1978 meeting between Moore and each of the OEMs, 709 F.2d at 988, App. A at p. 12a. There was evidence of a specific job which was lost by Multiflex in October, 1977, identified as the "SEDCO bid" (709 F.2d 988; App. A at p. 12a) which the court below found was adequate for the fact of damage proof under Section 2, but the court below concluded that Multiflex had not shown an adequate "fact of damage" related to the conspiracy claim and therefore could not recover treble damages under Section 4 of the Clayton Act based on its Section 1 conspiracy claim. 709 F.2d 989, 990; App. A at p. 13a. *On that basis alone*, the court below reversed the district court's award of damages under the Section 1 theory.[4]

The court below, however, overlooked the undisputed evidence that *after* January 1978, the starting point of the conspiracy, Multiflex was excluded from all sales to the three OEMs, the co-conspirators with Moore, for the entire year of 1978. Further, Multiflex was excluded from all sales to the three OEMs in 1979, with the exception of several sales to one of the OEMs (Cameron). The un-

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[4] The Fifth Circuit made such determination even though Moore never argued that the jury verdict failed to support the "fact of damage" under Section 1.

disputed evidence further showed that those sales were forced on Cameron by Multiflex's customers in 1979.[5]

An additional "fact of damage" after the January 1978 conspiracy was the loss of a sale of a hose bundle to a customer identified as "ENIEPSA". That loss occurred in early 1979. One of the OEMs (NL Industries—formerly Stewart & Stevenson) was asked by the end user to include a Multiflex bundle in its quotation for the turnkey job from that OEM. Even though the pressure ratings of the hose bundle were overstated by Moore and were below the industry standard, and even though Multiflex had a hose bundle which met the industry standard pressure ratings, NL Industries refused to quote the Multiflex bundle to the customer and instead quoted only the Moore bundle with the result that Moore, and not Multiflex, got the order.[6] Either of these two facts of damage was sufficient evidence to support the jury verdict of injury (Jury Interrogatory No. 6; App. C at p. 3c); the court below ignored such evidence even after it was emphasized in Multiflex's Petition for Rehearing.

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[5] For the purposes of this Cross-Petition, the evidence with respect to the forced sales to Cameron need not be considered since the sales are de minimis compared to the other sales to the three OEMs from which Multiflex was completely excluded in the years 1977, 1978 and 1979 (PX-190).

[6] The Fifth Circuit found that this incident of damage was a result of the "anticompetitive practices" of Moore. 709 F.2d at 994; App. A at p. 22a, fn 14. The court below further found that: "While the conspiracy was in force, customers were discouraged from buying from anyone other than Moore. This evidence forms a proper basis for a jury to find an unreasonably dangerous effect on competition." 709 F.2d at 988; App. 1 at p. 11a. Thus, there is an effect on competition from the anticompetitive practice and the fact that Multiflex did not get the order as a result conclusively demonstrates a fact of damage.

REASONS FOR GRANTING THE WRIT

I. The Court Below Decided An Important Federal Question, Namely, The Requirement For Proof Of "Fact Of Damage" In A Section 1 Sherman Act Conspiracy, In A Way In Conflict With The Applicable Decisions Of This Court.

The court below found ample evidence of a conspiracy under Section 1 by Moore, including Moore's own "smoking guns" evidence in the form of internal memos and letters. 709 F.2d at 988; App. A at p. 10a. Even though the jury (and the judgment of the district court), found that Multiflex suffered "injury" to its business or property by reason of the conspiracy (Special Interrogatory No. 6; App. C at p. 3c) and further that the conspiracy was the direct and proximate cause of the injury to Multiflex (Special Interrogatory No. 7; App. C at p. 4c), the *only* basis for the Fifth Circuit reversing the Sherman 1 cause of action was that Multiflex had not shown any "fact of damage" related to the conspiracy claim. 709 F.2d at 989; App. 1 at p. 13a.

In so holding, the court below ignored the undisputed evidence that Multiflex had been excluded from all of the business with the three OEMs during 1978 and from all of the business in 1979 except for several forced sales, as pointed out above in the Statement of The Case. The court below focused only on a specific job identified as the "SEDCO bid" in October, 1977 and concluded that because it was prior to the beginning of the conspiracy in January 1978, there was no proof of "fact of damage". However, Multiflex specifically pointed out in a Petition for Rehearing that it in no sense limited its "fact of

damage" proof to the SEDCO job. Multiflex pointed out to the court below the complete exclusion of Multiflex from virtually all of the OEM business during the 1978-79 period and also pointed to two other jobs, one of which was identified as the "ENIEPSA" job which was lost by Multiflex in the early part of 1979 as a direct result of the conspiracy.[7]

This Court in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946) dealt with a similar contention that the petitioners' evidence did not establish the "fact of damage". This Court, after referring to two prior decisions in which it had addressed precisely the same arguments,[8] stated in response to such contention, as follows:

> "In each case we held that the evidence sustained verdicts for the plaintiffs, and that in the absence of more precise proof, *the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business*, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that *defendants' wrongful acts had caused damage to the plaintiffs.* In this we but followed a well settled principle. *See Hetzel v. Baltimore & Ohio R. Co.*, 169 U.S. 26, 38,

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[7] One of the conspiring OEMs refused to quote the end user a Multiflex bundle even though the end user specifically requested a quote for a Multiflex bundle.

[8] Eastman Kodak Co. v. Southern Photo Material Co., 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684 (1927), and Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931).

> 39, 18 S.Ct. 255, 259, 260, 42 L.Ed. 648." [Emphasis added] 328 U.S. at 264.

In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114, 89 S.Ct. 1562 (1969), this Court concluded that the Court of Appeals erred in setting aside the District Court's decision with respect to "fact of damage", stating in Footnote 9:

> "Zenith's burden of proving the fact of damage under §4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage."

From the virtually complete exclusion of Multiflex from all sales to all of the OEMs in the relevant market, it cannot be logically disputed that there was proof of *some* damage from which the jury could have concluded as a matter of just and reasonable inference that Moore's wrongful acts had injured Multiflex's business. In failing to recognize such injury as "fact of damage", the court below reached a conclusion that could not have been reached if the court below had followed the above test from the *Bigelow* and *Zenith* cases and other decisions of this Court on this point. The decision below as it relates to the fact of damages is thus in conflict with this Court's decisions.

Since the "fact of damage" test is widely used by appellate courts as the threshold for recovery of damages under Section 4 of the Clayton Act,[9] it is important

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[9] See Von Kalinowski, *Antitrust Laws and Trade Regulations*, Vol. 10, §115.03(1) at p. 115-18 (1983), and appellate court cases cited in Footnote 2.

that a decision so clearly in conflict with this Court's decisions should not be permitted to stand without review by this Court.

II. Even If Proof Of A Specific Job Lost To Multiflex Is Required By This Court To Show "Fact Of Damage", There Is Undisputed Evidence That Such A Loss Occurred In Early 1979 After The Conspiracy Began In January 1978.

Although Multiflex contended below and still believes that the conspiracy between Moore and one of the OEMs (Stewart & Stevenson) began in October 1977, the court below concluded that the conspiracy began in January 1978. Accepting that date, and assuming that the "fact of damage" requires proof of loss of a specific job as a result of the conspiracy, the undisputed evidence is that on the job identified as the "ENIEPSA job", Moore obtained the sale and Multiflex lost it in circumstances which the jury could have concluded "as a matter of just and reasonable inference" was the result of the conspiracy.

In that "ENIEPSA job", the evidence established that the end user, ENIEPSA, had requested through its agent a quotation on the hose bundle, not only from Moore but also from Multiflex. Even though Moore was unable to supply the hose at the prevailing standard pressure rating, and even though the customer had requested the OEM to quote a Multiflex hose bundle, the Multiflex hose bundle was never quoted by the OEM to ENIEPSA. Multiflex had attempted to make a direct sale to ENIEPSA, through its U.S. agent, but the customer wanted the turnkey job which included the control equipment along with the hose bundle from the OEM. The conspiracy

thus precluded Multiflex from making any sale of its hose bundle to the customer ENIEPSA.

Cross-Petitioner Multiflex submits that this proof of a specific job loss is not required by this Court's applicable decisions on "fact of damage", but should Multiflex be in error in its understanding of this Court's prior decisions in *Bigelow* and the other cases prior thereto, the specific loss of the ENIEPSA job justifies a reversal of the court below on this point.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted with respect to Section 1 of the Sherman Act.

Respectfully submitted,

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To The United States Court of Appeals
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BRIEF OF CROSS-RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

In order to recover treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, a private antitrust plaintiff must prove by a preponderance of evidence that it has suffered actual injury to its business or property caused by the alleged antitrust violation. Accordingly, the only question presented to this Court is:

Whether the court of appeals correctly determined as a factual matter, based on a careful review of the record, that the evidence fails to establish "fact of damage" related to an alleged conspiracy where the only injury found by the court occurred prior to commencement of the conspiracy?

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BRIEF OF CROSS-RESPONDENTS IN OPPOSITION

STATEMENT

This case involved an alleged conspiracy between Samuel Moore and Company ("Moore") and three of its customers (the original equipment manufacturers or "OEMs") to exclude Multiflex, Inc. ("Multiflex") from the United States market for hydraulic hose bundles used in blowout prevention ("BOP") systems. The court of appeals found, however, that Moore showed only one specific incident of a bid lost with an OEM to Moore, and that incident occurred *before* the incipiency of the alleged conspiracy. The court therefore found that there was insufficient evidence of any injury caused by the alleged conspiracy and that, in the absence of this essential statutory

element, Multiflex's claim for treble damages must fail. Multiflex's cross-petition for certiorari asks this Court to second-guess the court of appeals on this narrow factual issue.

1. Factual Background[1]

There are two types of purchasers of hydraulic hose bundles—OEMs and end-users. OEMs purchase bundles from the manufacturer (such as Moore or Multiflex) and include them in the turnkey BOP system they sell to end-users. End-users also purchase hose bundles directly from the manufacturers either for use as part of the original BOP system or as replacement parts. As Multiflex's success demonstrates, end-users comprise a very substantial part of the market.[2]

Multiflex was incorporated in March, 1977. It initially approached the OEMs in late 1977, before it had developed any production capability. The OEMs placed no orders with Multiflex at that time, however, preferring to "remain loyal" to Moore, with whom they had had satisfactory dealings for well over a decade. (Pet. App. A, 4a.)

In October, 1977, a month before it developed production capability, Multiflex approached Sedco Co., an end-user. Sedco requested a price quote. Multiflex declined to give one, however, and instead insisted that Sedco obtain a quote directly from the OEM that would be providing the turnkey BOP system. (Pet. App. A, 4a.) The OEM quoted Sedco a competitive price on the Multiflex bundle and "refused pressures from Moore employees to badmouth the Multiflex product." (Pet. App. A, 12a.) Nevertheless, a Moore bundle was ultimately used for the Sedco job. (Pet. App. A, 4a.)

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[1] Moore adopts and incorporates by reference its Statement in its Petition for Writ of Certiorari docketed in this Court December 13, 1983 as No. 83-978 and adds the following additional facts specifically related to this Cross-Petition.

[2] Many end-users apparently prefer to purchase a turnkey BOP system which incorporates the hose bundles, rather than purchase the hose bundles themselves separately. OEMs sometimes quoted both Moore and Multiflex hose bundles in their system quotes, and end-users could request that a particular manufacturer's hose bundle be used in the system.

Multiflex began marketing to end-users directly, and was very successful. (Pet. App. A, 4a.) The market positions of Moore and Multiflex shifted almost immediately. In its first year of operations, Multiflex's sales (mostly to end-users) totalled over $560,000, 30 percent of Moore's sales. The OEMs eventually began placing orders with Multiflex. By 1979, Multiflex's sales totalled over $1,650,000 (almost doubling Moore's 1979 sales), and Multiflex had established itself as the dominant supplier in the United States market, controlling more than 62 percent of that market. (Pet. App. A, 5a.) To meet the increased demand, Multiflex expanded its facilities in the United States and opened a manufacturing plant in the United Kingdom.

The purported conspiracy to exclude Multiflex from the market allegedly originated in a series of meetings in January, 1978 between Moore and the three OEMs. At these meetings, two of the three OEMs allegedly agreed not to purchase bundles from any source other than Moore in return for Moore's promise to limit its direct sales to end-users and to charge a substantially higher price for its bundles to end-users than to OEMs. (Pet. App. A, 9a.)

2. The Proceedings Below

Moore filed a patent infringement action against Multiflex in March, 1978, and Multiflex counterclaimed alleging that Moore was guilty of a conspiracy in restraint of trade under Section 1 of the Sherman Act and an attempt to monopolize under Section 2 of the Sherman Act, §§ 15 U.S.C. 1, 2. The case was presented to a jury in a trial that lasted six weeks and generated over 2,079 pages of transcripts and 6 volumes of exhibits. The jury found the relevant market to be the United States market for hydraulic hose bundles, found both Section 1 and Section 2 liability, and awarded damages of $382,963.07 on the Section 1 claim before trebling and costs and fees.[3] (Pet. App. A, 2a, 5a-6a.)

[3] The jury also awarded Section 2 damages of $205,964.73, for a total judgment of $588,927.80 before trebling, costs, and fees. Prior to entry of judgment, Multiflex filed consent to reduce the judgment to $549,362.98, before trebling. (Pet. App. A, 2a, n.2).

On appeal, the Fifth Circuit undertook a detailed review of the factual record supporting Multiflex's claim of injury resulting from the alleged conspiracy. It found that there was sufficient credible evidence in the record to support two elements of the Section 1 claim—that Multiflex had entered into a conspiracy in restraint of trade with the three OEMs beginning January 1, 1978 and that the restraint was unreasonable. However, it found that there was insufficient proof of the third essential element—fact of damage resulting from the conspiracy.

To establish fact of damage, Multiflex pointed to the 1977 Sedco bid. However, the court found that Moore had not at that time induced the OEMs to join in the alleged conspiracy. Based on this evidence, the court of appeals reversed the district court's award of damages under the Section 1 conspiracy claim. The court explained:

> There must be a causal connection between the violation shown and the injury asserted to support a private sector award of money damages. At the time of the Sedco bidding, Moore was acting alone and not pursuant to a contract, combination, or conspiracy. Therefore, Multiflex has not shown adequate 'fact of damage' related to the conspiracy and cannot recover treble damages under Section 4 of the Clayton Act based on its section 1 conspiracy claim.[4]

(Pet. App. A, 13a; citations omitted).

The court of appeals based its holding on the well-established rule that "[t]o obtain any private monetary award based on the violation of Section 1, a plaintiff must prove an injury to its business or property, the so-called 'fact of damage' ". (Pet. App. A, 11a.) The court was very careful to note the difference between establishing fact of damage and

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[4] The court did, however, find that the evidence supported an inference that Multiflex would have won the Sedco job in the absence of Moore's actions, and that this evidence was sufficient fact of damage to support Multiflex's Section 2 claim, which did *not* require concerted action. (Pet. App. A, 20a).

determining the amount of damages after fact of damage has been established:

> The fact of damage showing does not require the antitrust plaintiff to prove with particularity the full scope of profits that might have been earned in the absence of unlawful activity in restraint of trade. It requires only that a plaintiff show with some particularity an element of actual damage caused by the defendant's violations of the antitrust laws.

(Pet. App. A, 11a; citations ommitted). And again, the court noted:

> Once the fact of damage is shown, a jury may use its discretion in determining the exact amount of damage resulting from the antitrust violation. By separating the fact of damage determination from the amount of damage computation, an antitrust plaintiff benefits from a 'relaxed standard' of showing quantum once the fact of damage is proven.

(Pet. App. A, 11a-12a, n.8)

REASONS FOR DENYING THE WRIT

Multiflex's cross-petition presents a purely factual issue. The court of appeals reviewed the record, found a "conspiracy" beginning in January 1978, and concluded that alleged damages occurring in 1977 did not constitute fact of damage arising from the conspiracy. There is no legal issue because the court of appeals only applied well-established law to a very specific fact situation. It is not the function of this Court to reexamine the record and reapply settled rules of law.

I. THE COURT OF APPEALS PROPERLY APPLIED THIS COURT'S PRECEDENT IN FINDING THAT MULTIFLEX FAILED TO PROVE FACT OF DAMAGE.

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that a plaintiff may recover treble damages only if he has been "injured in his property or business *by reason of*" the alleged

antitrust violation. This Court has repeatedly reaffirmed that fact of damage is both a separate and essential element of a private treble damage suit. In *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, the Court "emphasize[d] that even if there has been a violation of the [antitrust laws, the treble damage plaintiff] is not excused from its burden of proving antitrust injury and damages." 451 U.S. at 568.[5] *See also Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 103 S.Ct. 897; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89 (the evidence must be sufficient to show a competitive injury of the kind that the antitrust laws were enacted to prevent); *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (the plaintiff has the burden of proving antitrust injury by the preponderance of the evidence).

The Fifth Circuit Court properly applied this statutory requirement to the facts of this case. As Multiflex freely admits in its cross-petition, bidding on the Sedco job occurred *prior to* commencement of the alleged conspiracy. Therefore, even if anticompetitive conduct by Moore caused Multiflex to lose the Sedco bid, no fact of damage *as a consequence of* the alleged conspiracy has been established. Multiflex also refers in its cross-petition to "two other jobs" which it discussed in its

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[5] In *Payne*, this Court rejected petitioner's contention that it was entitled to recover "automatic damages" for price discrimination in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a). A second issue in *Payne*, which sharply divided the Court, was whether the plaintiff had in fact presented sufficient evidence of injury to the jury to sustain an award of treble damages. Based on the *particular factual record in that case*, a majority of the Court found it "a close question whether petitioner's evidence would be sufficient to support a jury award even under [the Courts's] relaxed damage rules." 451 U.S. at 567. Because the court of appeals had not ruled on whether the defendant had violated the antitrust laws, this Court remanded the case for a determination of the substantive violation issue and reconsideration of the sufficiency of petitioner's evidence of injury. 451 U.S. at 467-68. (The court "intimate[d] no view as to how [the latter] issue should be decided." 451 U.S. at 468).

Although the Court ruled unanimously that proof of "actual injury" is an independent prerequisite to recovery of treble damages, four dissenting Justices found "no basis for this Court undertaking to second-guess the Court of Appeals as to the sufficiency of evidence." 451 U.S. at 569.

Petition for Rehearing (Cross-Petition at 7). Bidding for one of those jobs, referred to as the "Penrod job," like the Sedco job, occurred "long before the January 1978 meetings" which originated the alleged conspiracy. (Appellee's Pet. for Rehearing at 4). Therefore, loss of the Penrod job could not possibly establish fact of damage *arising from* the conspiracy. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477.

As discussed below, Multiflex produced no additional evidence showing fact of damage and, in fact, there was evidence that at least one of the OEMs dealt with Multiflex during the period of the alleged conspiracy. Therefore, it is clear that the court of appeals correctly determined that Multiflex had failed to establish by a preponderance of the evidence that it suffered antitrust injury caused by the alleged conspiracy. This purely factual determination presents no issue warranting further review by this Court.[6]

II. THE ONLY ISSUE PRESENTED IS A FACTUAL ONE WHICH DOES NOT WARRANT REVIEW BY THIS COURT.

This Court should not be drawn into Multiflex's factual argument with the court of appeals. Contrary to what Multiflex suggests, the court of appeals did not reverse the award of section 1 damages solely on the basis of the Sedco job. (Cross-pet. at 4). Rather, after a careful review of the voluminous record below, the court of appeals found that Multiflex had failed to produce *any* credible evidence at all that it had suffered antitrust injury as a result of the alleged conspiracy. In fact, there was evidence that at least one of the OEMs did deal with Multiflex during the period of the alleged conspiracy.[7]

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[6] The conclusion of the court of appeals that fact of damage had not been established under Multiflex's section 1 claim makes even more obvious the fact that no "dangerous probability of success" existed under Multiflex's section 2 claim, especially since the heart of that claim is that Multiflex was excluded from sales to the OEMs.

[7] Multiflex attempts to discount the significance of these sales by characterizing them as "forced" (*i.e.*, requested by the end-user) and "de minimis." (Cross-pet. at 5). However, this affirmative evidence of dealing by an OEM clearly refutes the claim of damage resulting from the alleged conspiracy, especially in the absence of any credible evidence to the contrary.

In addition to the Sedco and Penrod jobs discussed above, Multiflex points only to the ENIEPSA job. Contrary to what Multiflex suggests, however, the evidence was far from undisputed that Multiflex failed to obtain the ENIEPSA bid as a result of the alleged conspiracy. Multiflex claims that the "undisputed" evidence shows that in 1979 NL Contol Industries ("NL"), an OEM, refused to quote a Multiflex bundle to the end-user at the end-user's request.[8] However, according to the very testimony of Anil Marrathe, a consultant to ENIEPSA, upon which Multiflex relies, ENIEPSA had (i) obtained a quotation directly from Multiflex;[9] (ii) been told by Moore that Moore would be "more than willing to supply Multiflex" bundles;[10] and (iii) obtained a bid from another OEM which included a Multiflex bundle.[11] It would have been illogical for the court to conclude on the basis of this evidence

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[8] Multiflex misleads the Court when it states with respect to the ENIEPSA bid: "The Fifth Circuit found that this incident of damage was a result of the 'anticompetitive practices' of Moore." (Cross-pet. at 5, n.6). In fact, the footnote of the court of appeals' opinion to which Multiflex refers discusses alleged anticompetitive practices with respect to the *section 2* claim, and refers to unilateral conduct by Moore. Indeed, this reference is perplexing, given Multiflex's contention that the court of appeals "overlooked" the ENIEPSA job in determining that there was no "fact of damage" under the section 1 claim.

Multiflex also points to the court of appeals' statement that "[w]hile the conspiracy was in force, customers were discouraged from buying from anyone other than Moore. This evidence forms a proper basis for a jury to find an unreasonably dangerous effect on competition." (Cross-pet. at 5, n.6; Pet. App. A, 11a). This reference is also misleading. The quoted language does *not* refer to the fact of damage element of a section 1 claim, but to the element requiring that the intended restraint of an alleged conspiracy be "unreasonable." (709 F.2d 980, 988 (5th Cir. 1983); Pet. App. A, 11a).

[9] See deposition testimony of Anil Marrathe excerpted at Appendix A (*infra*, pp. 1a-3a), 2a (Tr. vol. VII pp. 78-80; Tr. vol. VIII p. 12). All italics in the Appendices are supplied.

[10] See deposition testimony of Anil Marrathe excerpted at Appendix A, 3a. All italics in the Appendices are supplied.

[11] See deposition testimony of Anil Marrathe excerpted at Appendix A, 1a; deposition testimony of Anil Marrathe excerpted at Appendix B (*infra*, pp. 1b-3b) (Tr. vol. VIII pp. 57-60). All italics in the Appendices are supplied.

that Multiflex had failed to win the ENIEPSA job because of the alleged conspiracy.[12]

III. THE COURT OF APPEALS PROPERLY DISTINGUISHED BETWEEN THE FACT OF DAMAGE AND THE QUANTUM OF DAMAGE.

The court of appeals' decision is consistent with the opinions of this Court. As stated above, the court carefully distinguished between proof of *fact* of damage and proof of *amount* of damage. It did not reverse because the amount of damage was difficult to ascertain, but because there was no credible evidence of fact of damage caused by the alleged conspiracy. The cross-petition therefore relies on cases that support the holding below and demonstrate that Multiflex has presented no issue worthy of review by this Court.

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, involved, *inter alia*, a Canadian patent pool which refused to license foreign patents to Zenith and others seeking to export American-made radios and television sets into the Canadian market. Unlike this case, the court of appeals there *had found* in the particular facts of that case "some slight evidence of fact of damage." 388 F.2d 25, 37 (7th Cir. 1967). Nevertheless the Court held that insufficient fact of damage had been established because Zenith had sold some radios and television sets in Canada and because although Zenith had sought a pool license beyond the period of the statute of limitations, it had not sought a pool license again within that period. 388 F.2d at 37. This Court reversed, holding that "Zenith's burden of proving the fact of damage under § 4 . . . [was] satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage." 395 U.S. at 114, n.9 (italics in original).

Bigelow v. RKO Radio Pictures, 327 U.S. 251, *reh'g denied*, 327 U.S. 817, involved an unlawful conspiracy to prevent the

[12] Multiflex claimed in connection with the ENIEPSA job that Moore overstated the pressure ratings for its hose. The court of appeals apparently accepted this claim as true and considered it in connection with Multiflex's *section 2* claim dealing with the *unilateral* conduct of Moore.

petitioners from securing motion pictures for exhibition in their theatre until after preferred exhibitors had shown them in earlier and more desirable runs. The petitioners introduced two classes of evidence to establish their damages. One was a comparison of earnings during the relevant five year period of petitioner's theatre with the earnings of its competitor which was able to obtain first-run films. The other was a comparison of petitioner's receipts from the operation of its theatre during the five year period beginning roughly with the start of the conspiracy with receipts during the four years prior to that.

The Seventh Circuit Court found that the first class of evidence failed to establish adequate fact of damage because such evidence "would not tend to prove what profits either [theatre] would have received under any system other than the illegal . . . system . . . ." 150 F.2d 877, 884 (7th Cir. 1946). The second class of evidence was rejected as a basis for proving fact of damage because "plaintiffs neither operated nor assisted in operating any theatre prior to their ownership of this one, and these facts would only prove that matters other than the illegal . . . system had proximately caused the damages assessed by the jury." 150 F.2d at 883-84. Thus, the court of appeals essentially confused proof of *fact* of damage with proof of *amount* of damage. Accordingly, in reversing the court of appeals, this Court observed that a defendant whose wrongdoing had made it difficult to ascertain the precise damages suffered by the plaintiff cannot complain that damages cannot be measured with the same exactness as would otherwise be possible. 327 U.S. at 260-61.

Similarly, in both *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, and *Eastman Kodak Co. v. Southern Photo Material Co.*, 273 U.S. 359, the real issue was that the court of appeals had reversed an award of damages because of the difficulty in measuring damages. In *Story*, this Court stated "[i]t is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage. . . ." 282 U.S. at 562. In *Eastman Kodak*, the Court confined its consideration to "whether there was any competent and legal proof on which a *measurement* of the plaintiffs' damages could be based." 273 U.S. at 370 (emphasis added).

Thus, in each of the cases cited by Multiflex the court of appeals reversed an award of damages, *even though it found that there was some evidence of fact of damage*, either because damages were difficult to measure or, in the case of *Zenith*, because the plaintiff did not make a second futile request for a patent license within the period of the statute of limitations. In contrast, in the case now presented to the Court, the plaintiffs failed to establish *any* credible evidence of fact of damage. The Fifth Circuit Court's fully factual determination is not inconsistent with the prior opinions of this Court, and does not warrant further review.

CONCLUSION

For all of the foregoing reasons, the cross-petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A
DEPOSITION TESTIMONY OF ANIL MARRATHE, TR. VOL. VII PP. 78-80; TR. VOL. VIII P. 12

QUESTION:

You received, from your testimony, as a bid one from NL Controls and also TRW?

ANSWER:

That's correct.

* * *

QUESTION BY MR. REDD:

I just want to be sure. Did the NL Controls bid contain a hose bundle manufactured by the Multiflex Company to your knowledge?

ANSWER:

No, it did not.

QUESTION:

Were they requested to obtain a bid from the Multiflex Company?

ANSWER:

Yes.

QUESTION:

Why were they requested to obtain a bid from Multiflex?

ANSWER:

Well, I don't know whether you want a long answer or a short answer.

QUESTION:

I want your answer.

ANSWER:

Okay. Well, there are several hose bundle manufacturers in this country. Specifically, there are really right now two, which is Multiflex and Samuel Moore hose bundles. And as I

said to you before, hose bundles, being part of the control system, we had given the responsibility to the manufacturer of the control system to acquire the quote for the hose bundles. So *we did not really specifically ask NL Control to—so we did not really ask NL Controls specifically to get any bids. It was really left to them to get any bids that they wanted.* And so we got a bid from NL Controls which included the hose bundles.

We got a bid from TRW which also included the hose bundles. The Multiflex bid came from the TRW people. We met with Multiflex. They made a presentation, and they showed us some other products. And since we were trying to get the best product possible for our job, we suggested that we would like to have a quote also from Multiflex for this job. So that is how it came about that we had the quotes from both of the companies.

QUESTION:

Let me see if I understand.

ANSWER:

Okay.

QUESTION:

Did you ask NL Controls to use a Multiflex bundle, or at least quote the product?

ANSWER:

We did not ask them to use it.

QUESTION:

Did they quote a Multiflex product?

ANSWER:

They did not quote a Multiflex product, but we requested them because *we had received a bid independently from Multiflex.*

QUESTION:

Did NL Controls refuse to quote Multiflex product?

ANSWER:

They did not refuse to quote because they said, 'our product is the customer's choice, and if you wanted the Multiflex, we would be more than willing to supply Multiflex to you.'

APPENDIX B
DEPOSITION TESTIMONY OF ANIL MARRATHE
TR. VOL. VIII PP. 56-60

QUESTION:

. . . Do you recall making that statement, 'my initial recommendation will be Samuel Moore since they are a well-established Company?

ANSWER:

Yes, that would be my sentence.

* * *

QUESTION:

Do you recall making the statement . . . 'of course, their opinion could be tainted because they may have some working arrangement with Synflex"?

ANSWER:

Yes, I—I do recall having such an opinion and making such a statement.

QUESTION:

At the time that you wrote the memorandum had you discussed with NL Controls whether they had some so-called working relationship with Synflex?

ANSWER:

I don't believe I had specifically discussed with NL Controls about the working arrangements, but all the previous projects that NL Controls had worked on they had utilized Synflex hoses and hose bundles so it was probably at that time my—*simply an opinion and nothing else.*

QUESTION:

At the time that you wrote the memo *had you discussed with Synflex whether they had some working arrangement with NL Controls?*

ANSWER:

No, I had not discussed such a—

QUESTION:

On what did you base your statement that NL Controls had used Synflex in their previous projects?

ANSWER:

Because I'm familiar with NL Controls equipment, and they have provided quite a few control systems to our industry and most of their hoses that I was aware of were made by Synflex.

QUESTION:

That was the sole basis for the statement you made in that memorandum?

ANSWER:

That is correct.

QUESTION:

Looking at the final paragraph in that memorandum, the final sentence reads: 'We may have some problems in promoting a working arrangement between Multiflex and NL Controls.' That is the tail end of that sentence.

ANSWER:

Yes, I see that sentence.

QUESTION:

Do you recall making that statement in the memorandum?

ANSWER:

Yes, of course. It is there so I have made that statement.

QUESTION:

At the time that you wrote the memorandum, had you discussed with NL Controls whether they might have some problems in promoting a working arrangement with Multiflex?

ANSWER:

No, I had not discussed those specific questions, but I have dealt through my business experience with a variety of manufacturers and these are simply some impressions and opinions that I gathered from having initial discussion with a few of these companies.

QUESTION:

Was your basis for making that statement the same basis you previously identified for the final sentence in paragraph 2?

ANSWER:

Perhaps. But, you know, it's—it's all together. The whole picture has to be taken together. I don't know if you can separate paragraph 2 from paragraph 3, et cetera, et cetera. But perhaps it's a correct assumption.

QUESTION:

Had you ever discussed with Multiflex whether they might have problems in promoting a working arrangement with NL Controls?

ANSWER:

I don't remember discussing specifically with them, but *my impression was, from Bruce McConkey and all, that there really would be no problem, they're an aggressive company and really shouldn't have any problem.*"